IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 29, 2005

STATE OF TENNESSEE v. CHRISTOPHER A. WILLIAMS, a/k/a "BOOGER"

Direct Appeal from the Criminal Court for Sullivan County
No. S46,071 Phyllis H. Miller, Judge

No. E2005-00493-CCA-R3-CD - Filed March 6, 2006

Defendant, Christopher A. Williams, a/k/a "Booger," pled guilty to three counts of selling .5 grams or more of cocaine, two counts of selling less than .5 grams of cocaine, and one count of possession of more than .5 grams of cocaine with the intent to sell. He received a total effective sentence of seventeen years. In his appeal, Defendant challenges the trial court's denial of community corrections. After a thorough review of the record, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JOSEPH M. TIPTON, J., joined.

Stephen M. Wallace, District Public Defender; and William A. Kennedy, Assistant Public Defender, Blountville, Tennessee, for the appellant, Christopher A. Williams, a/k/a "Booger."

Paul G. Summers, Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and J. Lewis Combs, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Background

At the guilty plea submission hearing, the State briefly summarized the evidence underlying Defendant's convictions, stating that in counts one, four, and five, Defendant sold .5 grams or more of cocaine to a confidential informant. The State alleged that in counts two and three, Defendant sold less than .5 grams of cocaine to the same confidential informant. Finally, the State maintained that in count six, a search of Defendant's residence revealed the presence of more than .5 grams of cocaine in addition to paraphernalia indicating Defendant's intent to sell the cocaine. On counts one, four, and five, Defendant pled guilty to selling .5 grams or more of cocaine, a Class B felony. On

counts two and three, Defendant pled guilty to selling less than .5 grams of cocaine, a Class C felony. Finally, in count six, Defendant pled guilty to possession of more than .5 grams of cocaine with the intent to sell, a Class B felony. The parties agreed that all of the sentences imposed by the trial court would run concurrently; there was no further agreement as to sentencing.

At the sentencing hearing, the trial court determined that Defendant was a Range II offender. Finding that Defendant had a further history of criminal convictions in addition to that necessary to make him a Range II offender, the court imposed a sentence of seventeen years for each of the Class B felony convictions and a sentence of ten years for each of the Class C felony convictions. The court also imposed a fine of $2,000 for each of the six convictions.

Defendant requested alternative sentencing, specifically community corrections. The trial court found that Defendant was not eligible for probation, but he was potentially eligible for community corrections. The trial court noted that Defendant had a recent conviction for domestic violence. Further, the court noted that Defendant had a fairly extensive criminal history, citing his previous convictions for "Schedule II drugs," domestic violence, driving under the influence, driving on a suspended license, underage drinking, and leaving the scene of an accident. Additionally, Defendant had a previous unwillingness to comply with the conditions of a sentence involving release into the community; there was an outstanding capias for him for failing to report and absconding from supervision. The trial court acknowledged that Defendant had a good work history, and he voluntarily pled guilty; however, the court determined that Defendant should not be sentenced to community corrections.

II. Sentencing

On appeal, Defendant does not challenge the length of his sentences or his designation as a Range II offender. Instead, Defendant contends that he "should have been granted probation or some form of alternative sentencing," specifically community corrections. When a defendant challenges the length or the manner of service of his or her sentence, this Court must conduct a de novo review with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). This presumption, however, is contingent upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). If the record fails to show such consideration, the review of the sentence is purely de novo. *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

In making its sentencing determinations the trial court must consider: (1) the evidence presented at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any appropriate enhancement and mitigating factors; (6) the defendant's potential or lack of potential for rehabilitation or treatment; and (7) any statements made by Defendant in his own behalf. T.C.A. §§ 40-35-103, -210; *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995). The defendant bears the burden of showing that his sentence is improper. T.C.A. §

40-35-401(d), Sentencing Commission Comments; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

Defendant was convicted of two Class C felonies and four Class B felonies. Although a defendant is normally entitled to a presumption of being a favorable candidate for alternative sentencing options if convicted of a Class C felony, this presumption does not exist for Defendant because he was also convicted of a Class B felony. *See* T.C.A. § 40-35-102(6). Moreover, Defendant is a Range II offender, which classification also removes the presumption in favor of alternative sentencing. *Id.* Because Defendant was convicted of a drug-related, non-violent felony offense, however, he is eligible for, but not automatically entitled to, a community corrections sentence. T.C.A. § 40-36-106(a); *State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). The purpose of the Community Corrections Act of 1985 is to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." T.C.A. § 40-36-103.

Defendant is not eligible to be placed on community corrections under the "special needs" provision of Tennessee Code Annotated section 40-36-106(c). Before being placed in community corrections under this provision, an offender must first be eligible for regular probation. *State v. Cowan*, 40 S.W.3d 85, 86 (Tenn. Crim. App. 2000); *State v. Kendrick*, 10 S.W.3d 650, 655 (Tenn. Crim. App. 1999). Because Defendant's classification as a Range II offender and his seventeen-year sentences for his Class B felony convictions render him ineligible for probation, he does not qualify for community corrections consideration under the special needs provision. T.C.A. §§ 40-35-102(6), -303(a).

Thus, Defendant must meet the following minimum eligibility criteria. The following offenders are eligible for community corrections:

> (A) Persons who, without this option, would be incarcerated in a correctional institution;
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> (B) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;
>
> (C) Persons who are convicted of nonviolent felony offenses;
>
> (D) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
>
> (E) Persons who do not demonstrate a present or past pattern of behavior indicating violence;

(F) Persons who do not demonstrate a pattern of committing violent offenses.

T.C.A. § 40-36-106(a)(1)(A)-(F).

The Community Corrections Act does not provide that all offenders who meet these requirements are entitled to such relief. *State v. Grandberry*, 803 S.W.2d 706, 707 (Tenn. Crim. App. 1990). Instead, the eligibility criteria is interpreted as a minimum standard to guide the court's determination of eligibility under the Act. *Id*.

The trial court stated, "I'm denying community corrections because of the crime of violence and all the enhancing factors outweighing the mitigating factors." The trial court noted Defendant's criminal history and his failure to rehabilitate after repeatedly receiving probation.

In determining if incarceration is appropriate, a trial court may consider the need to protect society by restraining a defendant with a long history of criminal conduct, the need to avoid depreciating the seriousness of the offense, whether confinement is particularly appropriate to effectively deter others likely to commit similar offenses, and whether less restrictive measures have often or recently been unsuccessfully applied to the defendant. T.C.A. § 40-35-103(1); *see also Ashby*, 823 S.W.2d at 169. Additionally, a trial court should consider the defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. T.C.A. § 40-35-103(5). A trial court is in the best position to determine a defendant's amenability to community corrections because of its ability to observe the defendant's demeanor and characteristics first hand. *State v. Grigsby*, 957 S.W.2d 541, 547 (Tenn. Crim. App. 1997).

Defendant has not met his burden of establishing his entitlement to a community corrections sentence. Defendant has a long history of criminal conduct rendering confinement necessary to protect society from additional criminal behavior by Defendant. Furthermore, measures less restrictive than confinement have been repeatedly and unsuccessfully applied to Defendant.

CONCLUSION

Accordingly, we conclude that Defendant has failed to meet his burden of demonstrating that his sentences are improper. The judgments of the trial court are affirmed.

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THOMAS T. WOODALL, JUDGE